JD(ATL)–25–04
Cincinnati, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

BEACON ELECTRIC CO.

and **CASE 9–CA–35127**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 212, AFL–CIO

Eric Taylor, Esq., for the General Counsel.
Jeffery Mullins, Esq., & Fred Ungerman, Esq., of Cincinnati, OH, for the Respondent.
Jerry Spicer, Esq., for the Charging Party.

SECOND SUPPLEMENTAL DECISION

This matter was tried before Administrative Law Judge Richard H. Beddow, Jr. in May 1998. Judge Beddow issued a decision (JD–174–00) on July 14, 1998. The Board remanded that matter in light of its May 11, 2000 FES decision (331 NLRB No. 20). The judge issued a December 20, 2000 supplemental decision.

On July 28, 2003 the Board again remanded this matter to Judge Beddow. The Board stated in that order remanding the case:

> *Although we agree with the judge that the General Counsel met his initial burden under FES of establishing an unlawful refusal to consider or to hire the union applicants, we find that the Respondent was improperly denied an opportunity to present evidence to show that it would not have considered or hired the alleged discriminatees even in the absence of their union activity or affiliation. Accordingly, we shall remand this aspect of the case to the judge for further consideration, under FES, the Respondent can demonstrate that it would not have considered or hired the alleged discriminatees, even in the absence of their union activity or affiliation.*[1]

[1] The Board stated at footnote 1, "In remanding this case, we are not passing on the issues raised by the parties' exceptions and briefs at this time, except as detailed herein."

Judge Beddow having retired, this matter was assigned to me for action in accord with the Board's July 28, 2003 remand. I set this matter down for an April 5, 2004 hearing.

Respondent Beacon Electric Co. filed an April 2 motion in which it waived its right to hearing and stated if "the hearing were to be held, Respondent, consistent with the Board's limited remand order, and without waiving Respondent's exceptions previously filed with the Board, would rest on the record." Respondent's motion was granted and the parties were given a deadline for receipt of briefs. Respondent then filed a brief.

Respondent's argument:

Respondent stated in its brief, "it appears clear from the Board's Order that Judge Robertson may not, in this remand, revisit the issues surrounding General Counsel' prima facie case." However, Respondent went on to argue that Judge Beddow erred in his finding that Respondent's referral system was inherently destructive of employees' Section 7 rights.

Respondent argued in that regard that General Counsel failed to establish a prima facie case in that he failed to show that Respondent's exclusive use of a referral system for the selection of new hires was discriminatorily motivated. According to Respondent's argument, its exclusive use of its referral system predated any union activity and Respondent continued to exclusively use that same referral system throughout the events alleged in the complaint.

Findings:

I must consider whether I am authorized to consider Respondent's argument. As shown above, Respondent waived its right to a hearing on the question of whether it would not have considered or hired the alleged discriminatees even in the absence of their union activity.

To a limited degree, Respondent does argue that it would not have considered for hire, or actually hired, the alleged discriminatees even in the absence of their union activities. However, instead on putting on evidence to support that claim, Respondent argued that the record already contained that evidence and that that evidence showed that General Counsel failed to prove a prima facie case. Respondent argued that Judge Beddow's finding that Respondent's referral system was inherently destructive of Section 7 rights was incorrect and that that finding should be reversed.

Perhaps Respondent is correct in that claim. However, consideration of that claim would involve review of the Decision and, perhaps, the Supplemental Decision, of Judge Beddow. I am not authorized to review those decisions. Instead I am specifically limited in my deliberations by the order of the Board. That order as shown above, limits my authority to consideration of whether Respondent proved at the reopened hearing

that it would not have considered or hired the alleged disciminatees in the absence of their union activity or affiliation.

I am aware of the Board's statement in footnote 1 that by this remand, it is "not passing on the issues raised by the parties' exceptions and briefs at this time, except as detailed herein." However, the Board said nothing in that regard about extending the scope of its remand to include consideration of those issues raised by the parties.

I find that Respondent did not prove in these proceedings that it would not have considered or hired the alleged discriminatees even in the absence of their union activity or affiliation.

Dated at Washington, DC,

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Pargen Robertson
Administrative Law Judge